SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: March 18, 2005	**DEPT. 71**	**REPORTER A:**	**CSR#**
PRESENT HON. RONALD S. PRAGER	**JUDGE**	**REPORTER B:**	**CSR#**
CLERK: K. Sandoval			
BAILIFF:		**REPORTER'S ADDRESS: P.O. BOX 120128**	
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JUDICIAL COUNSEL
COORDINATION PROCCEEDINGS
NO. JCCP 4221
CASES 1,11,111, AND 1V

TITLE [Rule 1550(b)]
NATURAL GAS

SECOND TENTATIVE RULING:

The Court issues this second tentative ruling on the motion for access to claim forms submitted in connection with the El Paso settlement (the "Claim Form Motion"), and the motion for leave to serve interrogatories on certain unnamed class members (the "Interrogatory Motion") in the Judicial Council Coordinated Proceedings (JCCP) Nos. 4221, 4224, 4226, and 4228, the Natural Gas Anti-Trust Cases I, II, III & IV as follows:

The Court denies the Claim Form Motion, as the information sought is not only protected by the mediation privilege, but also by a Court order restricting its use for any purpose outside the mediation. The additional arguments advanced by Defendants in the second round of briefing on this issue are simply not persuasive. Furthermore, because (1) this trial is likely to be bifurcated such that individual class members' claims for

damages will be assessed after Plaintiffs prove their case on a class-wide basis, and because (2) Defendants' discovery is specifically designed to elicit information regarding the amount of damages likely to be claimed by the noncore class members at the second phase of the trial, Defendants cannot avoid the obvious fact that the discovery is premature and must await the disposition of the first phase of the trial.

Furthermore, in their papers, Plaintiffs have stipulated that they will not seek to introduce any individualized proof of damage to support the element of class-wide or global damages, i.e., that Defendants' alleged anticompetitive conduct caused class-wide damages and/or impacted the members of the class. Lastly, as to the argument that Defendants need the discovery at issue to counter Plaintiffs' expert testimony, the very arguments Defendants make in their papers regarding the allegedly wrong assumptions underlying the expert's opinion show that Defendants already have at their disposal information with which to impeach the credibility of and/or the conclusions reached by Plaintiffs' expert.

In the second round of briefing, Defendants also argue quite strenuously that this case is highly analogous to *J.P. Morgan & Co., Inc. v. Superior Court*, 113 Cal. App.4th 195 (2003). The Court, however, disagrees. While Defendants insist that the discovery is needed to show that such common issues, as liability, causation and fact of injury are absent in this case, a careful reading of Defendants' papers reveals otherwise. Defendants make much ado about the possibility that many members of the class mitigated their damages by "passing through" the higher costs or by applying other of mitigation techniques such as hedging. See Defendants' Reply at 7:16-21. However, it is well settled that the common issue of causation or impact is not undermined by evidence showing that some class members were able to offset their damages. As noted by *J.P. Morgan*, "even if a plaintiff has passed on the entire overcharge, he or she is not per se precluded from otherwise proving injury. For example, even though the entire overcharge has been passed on, the plaintiff may have

lost a percentage share of the market or otherwise suffered reduced sales" (*id.*, at 212), or there may have been costs associated with the mitigation.

Lastly, Defendants also argue that in assuming causation (that the alleged conspiracy was a substantial factor in the inflated prices), Plaintiffs' expert did not account for the variety of the transactions (in the purchase and possible sale of natural gas) that were undertaken by the noncore class members. This argument, however, makes little sense given that there is no dispute in this case that at the time in question, the price of natural gas at the Southern California border was higher than in other markets. These circumstances show that an assumption of class-wide damage is not unreasonable here. Further, if Plaintiffs can prove that Defendants engaged in a conspiracy to hike the price of natural gas and also show that their actions were a substantial factor in causing an anticompetitive price increase, the variety of transactions undertaken by the various class members would not help Defendants. Again, this is because even if some class members were not damaged (because, e.g., they had fixed-price contracts), this proof would not contradict the reasonable assumption that not all class members were as fortunate. *See Id.* at 215 ("For class certification purposes, if plaintiffs can establish a conspiracy to fix prices, and that they purchased the affected goods or services, the fact of injury or impact of the conspiracy can be treated as a common question.") Thus, even if the Court were to allow the discovery (interrogatories) Defendants seek, the responses would not allow Defendants to dispute successfully the common issue of global damage (as opposed to individual) or class-wide injury. The only way to accomplish this would be to allow discovery on all class members, which of course, would defeat the entire purpose of the class action. Lastly, in *J.P. Morgan*, the question of different types of purchases or transactions was discussed in the context of a potential conflict of interest between class members, which Defendants have utterly failed to address in their papers.

Accordingly, the Court denies Defendants' motion to compel discovery of nonrepresentative, noncore class members, and grants Plaintiffs' motion for a protective order.